IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 983

OTIS & CO., *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION AND THE UNITED LIGHT AND POWER COMPANY, *Respondents*.

In the Matter of the Application of Securities and Exchange Commission to Enforce and Carry Out a Plan to Effectuate the Provisions of Section 11(b) of the Public Utility Holding Company Act of 1935 With Respect to The United Light and Power Company.

BRIEF FOR RESPONDENT, THE UNITED LIGHT AND POWER COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the United States District Court for the District of Delaware, approving the plan submitted by The United Light and Power Company, which had been ap-

proved by the Securities and Exchange Commission (R. 123), is reported in 51 F. Supp. 217; and appears in the Record at page 94a.

The opinion of the United States Circuit Court of Appeals for the Third Circuit affirming the judgment of the District Court was filed April 20, 1944 and appears in the Record at page 144.

ADDITIONAL STATEMENT OF THE CASE.

The petitioner neglects to state its interest in the subject matter or to explain the manner in which it became a party to this proceeding. These facts are pertinent to an exercise of the discretion of this Court in granting a writ of certiorari.

Throughout the proceedings before the Securities and Exchange Commission (hereinafter referred to as the "Commission"), which led to the approval of the plan submitted by The United Light and Power Company (hereinafter referred to as "Power") for its dissolution in order to comply with the requirements of the Public Utility Holding Company Act of 1935 and the orders of the Commission issued under the authority of said Act, there was no appearance by Otis & Co. nor objection raised by said company, or by any other preferred stockholder, to the proposed plan.

The Commission, before entering its final order, required that the distributive share of the preferred stockholders should be increased from 91.2 per cent of the common stock of The United Light and Railways Company (hereinafter referred to as "Railways") to an allocation of 94.52 per cent of Railways' common stock to Power's preferred stockholders. Thereby, the allocation originally proposed of 8.8 per cent of Railways' common stock to the common stockholders of Power was reduced to 5.48 per cent. There was ample notice and opportunity for any preferred stockholder or common stockholder to have objected to the plan before the Commission. The record shows that repeated

notices were given to all stockholders of Power concerning the proceedings before the Commission (R. 4a, 93a). But the record shows that no objection was raised by any stockholder of Power either to the proposed or to the allowed allocation.

No appeal was taken by Otis & Co., or by any other party, from the order of the Commission to the Circuit Court of Appeals within sixty days as provided by the statute in Sec. 24 (49 Stat. 834, 15 U. S. C. ¶79x).

When the Commission applied to the United States District Court for the District of Delaware for an order approving and providing for the enforcement of the plan approved, notice was given, as directed by the court, to all stockholders of Power; and the order of the court required that any objections to the proposed enforcement of the plan approved by the Commission should be served on or before June 1, 1943 on counsel for the Commission and counsel for the company, and filed with the clerk of the District Court. Otis & Co., although fully advised of the original hearings before the Commission and of the hearing and of the requirements imposed by the order of the District Court, neglected to take any action whatsoever prior to their service of a notice of objections dated June 10, 1943, to which notice was attached a proposed answer (R. 96a). The District Court, upon the hearing of the case on June 15, 1943, permitted Otis & Co. to be heard and, following the order of the District Court approving the plan, Otis & Co. perfected an appeal to the United States Circuit Court of Appeals for the Third Circuit.

Otis & Co. is the owner of 10 shares of preferred stock out of a total of 600,000 shares outstanding (R. 95a, 96a).[1]

[1] The opinion of the Circuit Court of Appeals inadvertently refers to Otis & Co. as the holder of "fifty" shares of preferred stock. The answer and affidavit filed by Otis & Co. in the District Court claimed ownership of only *ten* shares. This amount is referred to twice in the District Court opinion.

QUESTIONS INVOLVED.

The petitioner seeks to have the Court review the action of the Securities and Exchange Commission in approving the plan for the dissolution of Power which was presented by Power under the compulsion of the statute and the orders of the Commission. The petitioner seeks to have the judgments of the District Court and of the United States Circuit Court of Appeals approving the action and order of the Commission reversed on the ground that the Commission and the two courts were in error in holding the plan of dissolution to be fair and equitable to the preferred and common stockholders of Power. The petitioner gives as a reason for the allowance of the writ that "the principles involved in the case at bar are of great public importance."

In behalf of the respondent, Power, it is submitted that the question presented *at the outset* is this: Is it a matter of sufficient public importance for this Court to determine whether a plan for the dissolution of a holding company is "fair and equitable" to the holder of 10 shares of preferred stock when that plan (after approval *sub silentio* by the holders of 599,990 shares of preferred stock and 3,476,768 shares of common stock) has been approved by the Commission, the District Court, and the Circuit Court of Appeals?

ARGUMENT.

I.

Petitioner's Interest is Insufficient to Warrant the Grant of the Writ.

In view of the trifling monetary interest which the petitioner, Otis & Co., as owners of 10 shares of preferred stock, has in the outcome of this case, the petitioner, in the lower court, claimed to have a special interest because Otis & Co. had once acted as an underwriter for the preferred stock. Obviously, Otis & Co. would have no standing to intervene below or to appeal to this Court on the basis of

any such metaphysical interest. It has been frequently held that a right of action or a right to appeal must be founded on a real and substantial interest, and that litigations cannot be carried on merely in order to establish a precedent or to clarify the law, even as to such important matters as constitutional right.

> "Broadly speaking, the right of a party to an appeal or a writ of error must be based upon a direct, immediate, pecuniary, and substantial interest in the particular litigation in which review is sought." 4 C. J. S. 349, Par. 177 (citing *Hamilton Trust Co.* v. *Cornucopia Mines Co. of Oregon*, 223 F. 494; Certiorari denied 239 U. S. 641).

See also:

Massachusetts v. *Mellon*, 262 U. S. 447, 487, 488.

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Boston Tow Boat Co. v. *United States*, 88 L. ed. Adv. Op. U. S. Sup. Ct. 720 (decided April 3, 1944) . . . where it was held that an intervenor without pecuniary interest could not prosecute an independent appeal, simply to obtain a precedent for use in similar litigation.

So the petition of Otis & Co. must rest upon its interest in the 5.48 per cent enhancement of the value of 10 shares of preferred stock. This stock, according to its own contentions, is worth less than $100 per share, so that the maximum gain which it could legitimately obtain from this extensive litigation would be $54.80. Otis & Co. has carried this $54.80 litigation through two courts and has obviously had its "day in court." It cannot be seriously aggrieved if the United States Supreme Court decides that, in the language of Mr. Justice Holmes, "somewhere there must be an end." We submit that it is not a matter of "great

public importance" to have the claim of Otis & Co. reviewed by this Court.

When it is argued that the questions presented are of great public importance, we suggest that *it is of even greater public importance not to encourage litigations of this character*, not to encourage persons with insubstantial interests to raise questions of alleged "great public importance," merely for the purpose of obtaining judicial decisions which they themselves have no more reason to seek than any one of several million people who may be interested in questions of public importance. We submit that the time of the courts, and particularly of the highest Court, should not be absorbed in passing upon theoretical questions for the amusement or ulterior profit of litigious persons, who have no substantial, pecuniary interest in having such questions determined.

II.

The Dissolution of Power Should Not Be Further Delayed.

In exercising its discretion in the grant or denial of the writ of certiorari, we submit that it is appropriate for the Court to consider the injury to public and private interests which has already been done and will be increased by further delay in enforcing the Commission's Order of April 5, 1943.

In accordance with the statutory request of Power, the Commission applied promptly to the United States District Court for the District of Delaware to enforce its order, and the plan for dissolution would have become operative, after its approval by the District Court August 4, 1943, if the case had not been further litigated by Otis & Co. in behalf of 10 shares of preferred stock. The dissolution of Power would have been carried through long ago and the common stock of Railways, now owned entirely by Power, would have been distributed, 94.52 per cent to the preferred stockholders of Power and 5.48 per cent to the common stockholders of Power, thereby transferring the control of Rail-

ways from Power, that is, from the common stockholders of Power, with voting rights solely in Class B, to the present preferred stockholders of Power. The litigation carried on by Otis & Co. has simply kept the real owners of Railways (the preferred stockholders of Power) out of actual possession and control of their property. It has also caused the maintenance of the needless expense of maintaining Power as a corporate entity. It has imposed the burden of this litigation upon the investors in Power.

This litigation has also impeded the administration of the Public Utility Holding Company Act, both in its application to this large utility system and in the restraint necessarily imposed upon the Commission in other matters. So long as a question of authority or exercise of discretion is being litigated, no matter how fruitlessly, it follows that the Commission will be embarrassed in its functioning in similar matters. Again, we submit that there is no public interest to be served in encouraging litigation for the sake of litigation by those who have no substantial interest which is visibly to be served.

III.

The Questions Presented Are Not of Great Public Importance.

It may be true that, in the language of the Circuit Court of Appeals, "The *principles* involved in the case at bar are of great public importance." But that does not mean that the *issues* which petitioner seeks to present to this Court are of great public importance, except so far as it is always a matter of public importance to have well-grounded precedents maintained. This Court has held frequently that the exercise of administrative discretion by administrative commissions should be respected. (See *U. S. v. Morgan*, 313 U. S. 409, 422.) It would be a matter of great public importance if *that* doctrine should be disputed and it appeared possible that the Court might reverse its previous rulings. But a mere demand that the

Court set aside an order of the Commission which has been made in the exercise of its administrative discretion does not actually present *that* fundamental issue which would be of "great public importance."

The petitioner endeavors to argue that the rule of "absolute priority" has been disregarded by the Commission. This is inaccurate and misleading, because the Commission, in its opinion, expressly stated that "absolute priorities must be respected." Then the Commission held that the accumulation of preferred dividend arrearages does not constitute a matured claim in the absence of liquidation, and further held:

> "To accelerate the arrearages and translate them into matured claims at their full face amount, so as to entitle the preferred stock not only to all the assets but also in perpetuity to the entire earning power of those assets—a portion of which would otherwise have been applicable to the common stock—would clearly be to enrich the preferred at the expense of the common." (R. 19a)

Accordingly, the Commission in making an administrative application of the law committed to its administration, determined to carry out the intent of the Congress and to distribute the assets of the dissolved company in such a way as not to deny to the common stockholders, who had put a substantial cash investment into the enterprise,[1] any participation at all in the *continuing enterprise*. The *enterprise* was *not* being *liquidated*. The holding company was being dissolved because of the statutory mandate. Other methods of reorganization or consolidation might have left *this* company intact. It seemed clearly unfair and inequitable to the Commission that the statutory mandate should be so applied, in dissolving one company in the system, as to enrich unjustly one group of the stockholders of that company at the expense of another.

[1] "Common's contribution to capital amounts to $28,482,745 preferred's $60,000,000."—Opinion of District Court (R. 103a).

Throughout its petition and brief, petitioner seeks to have it appear that "an Act of Congress is now terminating the existence of Power." (Pet. Brief, p. 20), and that "Power has received its death sentence under the express terms of the Act" (p. 22), and that "as the venture cannot continue, preferred stockholders are entitled to their contractual rights" (p. 22) . . . meaning thereby their rights upon a complete liquidation of the enterprise.

Such statements and arguments distort both the law and the facts. The Public Utility Holding Company Act of 1935 did not end utility enterprises or terminate the existence of any particular company. The law merely required the simplification of holding company systems; and that would necessitate the elimination of *some* companies and the continuance of others, Sec. 11(b) (49 Stat. 820, 15 U. S. C. 79k).

There were several alternative methods of simplifying this system. The Commission selected that method which called first for the dissolution of the top company, instead of another company.[1] But that choice should not operate to despoil common stockholders of rights and values which they would have retained if another company had been dissolved and Power had continued its corporate existence (R. 15a, 32a). The Commission's present exercise of discretion is based upon its previous exercise of discretion in ordering the dissolution of Power. That major action was never challenged or reviewed, by any court. Why should a minor subsidiary action be now reviewed?

It should be apparent that the Commission was acting in that realm of administrative discretion in which Congress had invested the Commission with its powers for the very purpose of making sure that the intent and spirit of the law should be made effective. The Commission reached a conclusion which was described in its own opinion as "of necessity one of over-all judgment and not susceptible of

[1] Order of Mar. 20, 1941, Holding Company Act Release No. 2636. (R. 4a)

mathematical demonstration." (R. 31a) Now petitioner seeks to have the Supreme Court lay down a rigid ruling which would fetter the exercise of the Commission's discretion and eliminate that flexibility of judgment which it is clearly the intent of the law that the Commission should exercise. If it were necessary to assure the Commission that reasonable exercises of its judgment will be sustained in the courts, the question raised might be one of great public importance. But since the Commission's authority and discretion has been heretofore and frequently sustained, we submit that a question of great public importance is not raised by a petition for review in a case where the Commission has simply exercised its statutory power and discretion to determine what is "fair and equitable."

> "Determination of what is 'fair and equitable' calls for the application of ethical standards to particular sets of facts, but these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents." *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 89.

CONCLUSION.

In the brief in behalf of the Commission, there will be presented ample authority and argument to sustain the action of the Commission. It seems unnecessary, and an imposition on the Court, to present at this time a similar argument. We do not believe the Court is required to undertake even a hasty review of the merits of the Commission action.

There may be a natural hesistance on the part of the Commission, when its orders are attacked, to oppose any appeal for judicial review, especially where one member of the Commission has filed a dissent. But, in behalf of the respondent company, and in the interest of its stockholders as a whole, we submit that it is neither necessary nor desirable, in aid of public or private interests, to have a fur-

ther delay in the determination of this proceeding to gratify the litigious desires of the owners of 10 shares of stock.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 24, 1944.